STATE OF MICHIGAN

COURT OF APPEALS

EDDIE B. ALLEN,

Plaintiff-Appellant,

v

DAIMLERCHRYSLER CORPORATION, DAIMLERCHRYSLER MOTORS CORPORATION and DAIMLERCHRYSLER SERVICES NORTH AMERICA, L.L.C.,

Defendants-Appellees.

UNPUBLISHED
March 14, 2006

No. 265427
Oakland Circuit Court
LC No. 03-049686-NZ

Before: Schuette, P.J., and Murray and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting defendant DaimlerChrysler Services North America, L.L.C.'s (DCS) motion for summary disposition in this age discrimination action.[1] We affirm.

The only issue properly before us is whether the trial court erred in granting summary disposition on plaintiff's age discrimination claim because there were genuine issues of material fact in light of the direct and circumstantial evidence presented to the trial court. This Court applies "a de novo standard when reviewing motions for summary disposition made under MCR 2.116(C)(10), which tests the factual support for a claim." *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). This Court "consider[s] the facts in the light most favorable to the nonmoving party, in this case, the plaintiff[]." *Id.*

A motion brought pursuant to MCR 2.116(C)(10) should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Miller v Purcell*, 246 Mich App 244, 246; 631 NW2d 760 (2001). When the burden of proof at trial would rest on the nonmoving party, the nonmovant may not rest upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that

[1] Plaintiff withdrew his appeal of the grant of summary disposition to defendants DaimlerChrysler Corporation and DaimlerChrysler Motors Corporation.

there is a genuine issue for trial. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). A genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the nonmoving party, leaves open an issue upon which reasonable minds could differ. *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). When deciding a motion for summary disposition under this rule, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence then filed in the action or submitted by the parties in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999).

The Michigan Civil Rights Act (CRA), and in particular MCL 37.2202(1), provides:

> An employer shall not do any of the following:
>
> (a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of . . . age . . . .

A plaintiff asserting an age discrimination claim must prove that he suffered an adverse employment action, *Wilcoxon v Minn Mining & Mfg Co*, 235 Mich App 347, 362; 597 NW2d 250 (1999), and that his age was a factor in the adverse employment decision, *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 539; 620 NW2d 836 (2001).

A plaintiff may prove unlawful discrimination by direct or circumstantial evidence. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 132; 666 NW2d 186 (2003). Direct evidence is evidence that, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's adverse employment actions. *Id*. at 133. "In a direct evidence case involving mixed motives, . . . a plaintiff must prove that the defendant's discriminatory animus was more likely than not a substantial or motivating factor in the decision." *Id*. (internal quotation marks and citations omitted). "In addition, a plaintiff must establish her qualification or other eligibility for the position sought *and present direct proof that the discriminatory animus was causally related to the adverse decision*." *Id*. (citation omitted; emphasis added). "Stated another way, a defendant may avoid a finding of liability by proving that it would have made the same decision even if the impermissible consideration had not played a role in the decision." *Id*. (citation omitted).

Here, plaintiff contends that there are two pieces of direct evidence. First, plaintiff testified that according to what he was told by Robert Gullion, a fellow DCS employee, Thomas Gilman,[2] a higher management employee, made a comment at a town hall meeting "about the number of older people in the organization and how they needed some fresh, young faces in the organization." Gullion generally confirmed this in his deposition and indicated that Gilman made the statement "[in] '99 maybe."

[2] It is undisputed that Gilman's employment with defendant ceased on May 31, 2002.

Second, plaintiff testified that in late 2000 or early 2001, Pauline Kelly, plaintiff's supervisor, "came into the staff meeting and made a comment that there are too many old faces in here. We need to get some young blood in here." Carl Yauk, another DCS employee, testified in his deposition that at a staff meeting in late 1999 or 2000, Kelly said: "We have too many grey-haired men in here. We need more younger men and women." Plaintiff testified that Yauk was at the same meeting as he was, so both men have different versions of what Kelly said at the meeting, and when that meeting took place.

Defendant, on the other hand, contends that both Gilman's[3] and Kelly's alleged statements are simply stray remarks that do not constitute direct evidence of bias.

It is true that allegedly discriminatory statements that are considered to be "stray remarks" do not constitute direct evidence of discrimination. *Sniecinski, supra* at 136; *Krohn v Sedgwick James of Michigan, Inc*, 244 Mich App 289, 292; 624 NW2d 212 (2001). Five factors are utilized to determine if allegedly discriminating remarks are considered to be stray, or whether they constitute direct evidence of discrimination:

> Factors to consider in assessing whether statements are "stray remarks" include: (1) whether they were made by a decision maker or an agent within the scope of his employment, (2) whether they were related to the decision-making process, (3) whether they were vague and ambiguous or clearly reflective of discriminatory bias, (4) whether they were isolated or part of a pattern of biased comments, and (5) whether they were made close in time to the adverse employment decision. [*Sniecinski, supra* at 136 n 8 (citations omitted).]

We conclude that the analysis of the factors enumerated above indicates that Kelly's and Gilman's statements are neither direct evidence of bias, nor mere stray remarks, but constitute circumstantial evidence that a trier of fact could interpret as proof of bias.

There is no dispute that Kelly and Gilman made their statements within the scope of their employment. However, the statements were not related to any decision making process regarding plaintiff, or anyone else for that matter.[4] There is no evidence suggesting that the statements were made within a discussion of hiring and recruitment issues. But, if a decisionmaker makes a statement to staff members that fresh, new faces are needed, this could be interpreted as relating to recruitment needs or goals, even if the meeting was not convened to discuss hiring and recruitment specifically.

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[3] The trial court excluded from evidence the testimony of Gullion regarding Gilman's alleged remark. For purposes of this issue, we assume, without deciding, that Gullion's testimony was admissible.

[4] Gilman's alleged statement can have no impact on the adverse employment actions at issue because he was no longer employed by defendant when plaintiff was denied the promotions at issue in this case.

Kelly's statement falls closer to those considered to be "vague and ambiguous" statements as opposed to those "clearly reflective of discriminatory bias." *Sniecinski, supra* at 136 n 8. Kelly's statement was not directed to anybody in particular, was made while walking into a meeting, and was not related to any particular topic. See *Krohn, supra* at 297-299, citing and discussing *Cooley v Carmike Cinemas Inc*, 25 F3d 1325 (CA 6, 1994), and *Phelps v Yale Security, Inc*, 986 F2d 1020 (CA 6, 1993).

The alleged statements were not part of a clear pattern of biased comments. *Id*. Rather, the alleged statements could only be interpreted as isolated, as they were made by two separate individuals at different times and in different contexts.

Finally, the timing of the statement of Kelly, and of the adverse employment decisions, is not well established by the evidence.[5] *Krohn, supra.* Plaintiff testified that the staff meeting at which Kelly made her alleged "old faces" remark occurred in late 2000 or early 2001. Yauk testified, however, that the staff meeting at which Kelly allegedly made an ageist comment occurred in late 1999 or 2000. Thus, the timing of the alleged ageist comment in connection with an adverse employment action is not clear. DCS issued the open position notices (OPNs) for the positions at issue in August 2000, March 2001, September 2001, and December 2001. Because plaintiff testified that Kelly's comment occurred in late 2000 or early 2001, there were OPNs during that period for which plaintiff was included on the list of internal candidates, and that period was within the limitations period, there is evidence from which a trier of fact could conclude that Kelly's alleged comment was made close in time to an adverse employment decision. However, and importantly, the statements were not made in connection with any of these decisions. *Krohn, supra.*

From the analysis of the foregoing five factors, and without any evidence which would even remotely establish a connection to the decision at issue, we conclude that Kelly's alleged statement is not direct evidence of discrimination. However, if believed, the alleged statement by Kelly could, but need not, be interpreted as proof that age was a motivating factor in the decisions in which plaintiff was not chosen for promotion. Accordingly, we conclude that the alleged remark is circumstantial evidence of unlawful bias.

In cases involving circumstantial evidence, a plaintiff must proceed by using the burden-shifting approach set forth in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973). *Sniecinski, supra* at 133-134. To establish a rebuttable prima facie case of discrimination, a plaintiff must present evidence that (1) he belongs to a protected class, (2) he suffered an adverse employment action, (3) he was qualified for the position, and (4) his failure to obtain the position occurred under circumstances giving rise to an inference of unlawful discrimination. *Id*. at 134.

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[5] Plaintiff cannot sue for failure to be promoted in July 1998 or March 1999, because his complaint was filed on May 9, 2003. See *Garg v Macomb Co Community Mental Health Services*, 472 Mich 263, 281-282; 696 NW2d 646 (2005).

"Once a plaintiff has presented a prima facie case of discrimination, the burden then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse employment action." *Sniecinski, supra* at 134 (citations omitted). "If a defendant produces such evidence, the presumption is rebutted, and the burden shifts back to the plaintiff to show that the defendant's reasons were not the true reasons, but a mere pretext for discrimination." *Id*. (citations omitted). "Under either the direct evidence test or the *McDonnell Douglas* test, a plaintiff must establish a causal link between the discriminatory animus and the adverse employment decision." *Id*. at 134-135.

It is evident that plaintiff belongs to a protected class because of his age, and that plaintiff suffered adverse employment actions since he was not promoted to certain positions. *Peña v Ingham Co Rd Comm*, 255 Mich App 299, 311-312; 660 NW2d 351 (2003). Plaintiff has also produced sufficient evidence that he was qualified for the positions, especially since this prong of the prima facie case is not overly onerous. See *Hazle v Ford Motor Co*, 464 Mich 456, 469-470; 628 NW2d 515 (2001). During the first two years that plaintiff reported to Kelly, plaintiff received "role model" reviews. Charles Fuller, a human resources manager, testified that he was somewhat surprised to learn that plaintiff had not received an interview for a financial systems position that plaintiff sought. Kelly admitted in her deposition that plaintiff was "a hard worker" with "some very strong traits" and "was a good, solid performer." But Kelly also testified that plaintiff had "some areas he needed to develop." Kelly testified that plaintiff had room for improvement in his communication. In sum, there is evidence on both sides of the question of whether plaintiff was qualified for the positions for which he applied, which is sufficient to satisfy a prima facie case.

Finally, plaintiff's failure to be promoted arguably occurred under circumstances giving rise to an inference of unlawful discrimination. The individuals promoted were all younger than plaintiff. That fact, coupled with Kelly's alleged statement that there were too many "old faces" at her staff meeting, and that "new blood" was needed, which statement was corroborated by Yauk, could allow a jury to reasonably infer that plaintiff's failure to receive certain promotions was in part because of his age.

DCS's non-discriminatory reason for not promoting plaintiff is that other candidates were better qualified. Kelly testified that plaintiff had room for improvement in his communication skills and that other candidates with proven track records were more qualified:

> . . . I was looking for someone who had done this before, who had a proven track record, who had proven communication skills. And . . . we selected those individuals that we felt were better suited at that.
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> Mr. Allen happened to not be one of the employees at the top of that list. [It] [d]oesn't mean that he may not have been considered. He just wasn't at the top of the list. There were other candidates that in my senior manager's opinion were much more qualified than [plaintiff].

Kelly also testified in detail as to why she chose the candidates for these positions, all of which were neutral, and non-discriminatory. We conclude that DCS presented legitimate, non-discriminatory reasons for its decision not to promote plaintiff beyond the "band 93" position.

The question then becomes whether plaintiff has presented evidence showing that DCS's reason for not promoting him was a pretext for discrimination. In other words, plaintiff must show that the comments indicating bias were causally related to his failure to be promoted, and he may not rely upon speculation or conjecture. *Sniecinski*, *supra* at 134-136, 140. We conclude that plaintiff's pretext theory fails to remove the question of causation from the realm of speculation and conjecture.

While plaintiff presents Kelly's alleged comment as evidence that an ageist attitude motivated Kelly's failure to promote plaintiff, plaintiff fails to present evidence that the comment in question was related to any decision not to promote plaintiff. It remains speculative to posit that the allegedly age-biased sentiment expressed by Kelly was a motivating factor in any of her decisions not to promote plaintiff. Although plaintiff attempts to rely on Gilman's alleged comment, that comment was made in "'99 maybe," outside the limitations period, which began on May 5, 2000. *Garg v Macomb Co Community Mental Health Services*, 472 Mich 263, 281-282; 696 NW2d 646 (2005). Accordingly, plaintiff fails to present a genuine issue of material fact on the question of pretext or causation. The trial court properly dismissed the claim.

Regarding plaintiff's claim of age harassment, plaintiff fails to brief this issue by failing to cite authority. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998). "It is not sufficient for a party simply to announce a position . . . and then leave it up to this Court to discover and rationalize the basis for his claims . . . ." *Id.* (internal quotation marks omitted). Finally, in light of the resolution of the summary disposition issue, plaintiff's remaining evidentiary issues are moot. *Ewing v Bolden*, 194 Mich App 95, 104; 486 NW2d 96 (1992).

Affirmed.

/s/ Bill Schuette
/s/ Christopher M. Murray
/s/ Pat M. Donofrio